Owens-Illinois, Plastic Products Division *and* Teamsters Local 490, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20–CA–16101

December 14, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On April 30, 1982, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

We have carefully examined the record and, while the record was not as conclusive as the Administrative Law Judge indicated, we find that on the issues of the extent to which union activity was openly conducted in the plant and the identity of union supporters being well known to all parties, the record evidence is sufficient to sustain his findings in this regard.

Member Fanning does not rely on the Administrative Law Judge's rationale in concluding that no impression of surveillance was created by Respondent's notice to its employees because the identity of the union adherents was well known. Instead, in his view, Respondent's generalized references to the identity of union adherents, in the context of the entire notice, would not reasonably create the impression that Respondent was engaged in illegal surveillance of union activities.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed by Teamsters Local 490, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter called the Union), against Owens-Illinois, Plastic Products Division (hereafter called the Respondent), the Regional Director for Region 20 issued a complaint and notice of hearing on April 13, 1981.[1] The complaint alleges, *inter alia*, that the Respondent acting through its production manager created an impression that it was keeping its employees' union activities under surveillance and that it notified its employees that it would be futile to select the Union as their bargaining representative. By this conduct the Respondent is alleged to have engaged in conduct which violates Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (hereafter called the Act). The Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied the commission of any unfair labor practices.

A hearing was held in this matter in Fairfield, California, on October 27. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues involved. At the conclusion of the hearing the General Counsel made oral argument, supported by specific case citations, and the Respondent subsequently submitted a written brief. The oral argument and written brief have been duly considered.

Upon the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Owens-Illinois, Plastic Products Division, is an Ohio corporation with an office and place of business located in Fairfield, California. The Respondent's Fairfield plant is the only facility involved herein. At its Fairfield facility, the Respondent is engaged in the manufacture and nonretail sale and distribution of plastic containers and related products. During the calendar year ending December 31, 1980, the Respondent in the course of its business operations purchased and received at its Fairfield, California, facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of California. The pleadings admit, and I find, that the Respondent is, and has been at all times material, an employer within the meaning of Section 2(2) engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local 490, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless otherwise indicated, all dates herein refer to the year 1981.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The uncontroverted testimony indicates that the Union began its organizing campaign among the Respondent's employees either in late December 1980 or early January 1981.[2] Several weeks prior to the start of its efforts to organize the employees of the Respondent, the Union engaged in organizing activity at the gates of the two plants of other employers located adjacent to and on either side of the Respondent's facility. The organizing activity at the neighboring plants consisted of patroling the entrances and passing out handbills to the employees of these employers.

Mark Vazquez, then employed by the Respondent as a warehouse lift driver, was actively involved in the organizational activity in front of the adjoining plants. When the Union began its campaign at the Respondent's plant, Vazquez became the principal union adherent among the Respondent's employees. During the campaign at the Respondent's plant, Vazquez wore a jacket to work with a Teamsters insignia emblazoned on it. He also wore a Teamsters button in the plant and openly solicited employee support for the Union while at work.[3]

The Union filed a representation petition and the parties entered into a Stipulation for Certification Upon Consent Election agreement, which was approved by the Acting Regional Director on February 19. The agreement provided for a Board-conducted election on March 19.

According to the unrefuted testimony of the Respondent's plant manager, Phil DeVries, the relationship between employees and supervisors and managers at the plant was informal and open. There were approximately 81 unit employees and DeVries stated there was very little turnover among them. All personnel (unit employees and supervisors and managers) freely discussed matters affecting the operation of the plant and referred to each other by first names.

DeVries testified that during the months of January and February approximately 15 to 20 employees had come to his office to express their feelings about the organizational activity. During the course of these discussions, according to DeVries, many of these employees indicated who among the unit employees were supporters of the Union.[4] DeVries further testified that shortly after the Teamsters campaign began, several supervisors requested permission from management to post notices on the plant bulletin board expressing their feelings in opposition to the efforts to unionize the employees. DeVries granted permission to the supervisors to post such notices provided they were first screened by him and the Respondent's corporate attorneys. The testimony indicates that by March 18, 14 separate notices from supervisors were posted on the bulletin board located in the employees' breakroom; one each day for a 24-hour period.[5]

On March 16, the notice in question in this case was posted on the bulletin board.[6] The notice was authored by David Irwin, the Respondent's production manager. The notice was placed into evidence as General Counsel's Exhibit 2 and reads as follows:

> March 16, 1981
>
> TO: You Who Would Sell Out Your Fellow Workers
>
> *SUBJECT: Unionism*
>
> cc: All Loyal O-I Employees
>
> This is an open letter to that radical minority in our plant that would inject discontent into the minds of the rest of us to further your own selfish gains.
>
> You know who you are. My fellow employees know who you are and I know who you are. But more importantly, I know *WHAT* you are. The law prohibits my indicting you directly, but if the shoe fits, wear it.
>
> First, you are a person who mouths compassion for others, but seldom, if ever, feels it.
>
> Secondly, you are probably in trouble work-wise, either through a bad absentee record, poor work habits, or basic lack of responsibility, which shows itself as a lack of maturity. This is probably the biggest reason you have for taking up the union flag, that being to gain the false security blanket they allegedly can give.
>
> Thirdly, you probably haven't advanced in your job. This, you mistakenly believe, is due to some notion that we in management are picking on you. Nothing could be further from the truth. The reason you haven't advanced is because of management's ability to recognize and promote those individuals who have earned those promotions.
>
> You haven't had an opportunity to manage anything, so your understanding of what managers do is limited, if not entirely, non-existant [sic]. We are charged with the 24 hour responsibility of seeing that all of our employess [sic] have a safe, clean work place, along with an economic environment as

[2] The precise time that the organizing campaign commenced at the Respondent's plant is not clear in the record.

[3] The testimony indicates that in early 1980 the Glass Bottle Blowers Association (GBBA) attempted to become the bargaining representative of the Respondent's employees. Vazquez was a principal advocate in the plant for that Union at that time. A representation election was held and Vazquez and his cousin, Martin (Mack) Castillo, were observers for GBBA. The testimony further discloses that the employees rejected representation by GBBA by a vote of 72-to-12. At the hearing in the instant case, the Respondent's counsel attempted to adduce detailed testimony regarding Vazquez' activities on behalf of GBBA and to introduce into evidence the certification of results of the 1980 election. The General Counsel's objections to this were sustained; thus, the testimony was excluded and the proffered document was placed in the rejected exhibit file.

[4] There is no allegation in the complaint that these conversations involved unlawful interrogation.

[5] The plant worked three shifts and presumably the 24-hour period was to enable the notices to be read by employees on each shift.

[6] Vazquez testified he was working the day shift and saw the notice on the bulletin board at approximately 2 p.m. According to Vazquez, while he was copying the wording of the notice a secretary removed it from the bulletin board. However, it is apparent that, if the notice were removed, it was reposted since two employees, Pat Ryan and Mack Castillo, testified they saw the notice on the bulletin board between 11:40 and 11:50 p.m. that day before they started working on the graveyard shift. In light of DeVries' unrefuted testimony, I find the notice was posted the morning of March 16 and remained posted for a 24-hour period until replaced by another notice from another supervisor.

good or better than others in the field. We also are charged with the responsibility of maintaining a profitable operation. Certainly, a business cannot exist long on a non-profit basis.

Finally, we ask, of those who we manage, an honest day's work. The vast majority of those who work here give us the day's work and then some.

You should be warned that we won't fall for the lies and dissention [sic] you spread and when all the votes are in, you'll again be shown up for what you are. We can only hope that your energies in the future can be directed towards doing your day's work and supporting the people who provided you the opportunity of working here and keep you here, no matter what the business picture might be.

This will be the last letter or verbal communication you, who preach union, will receive from me, as I won't deny the majority my honest effort for the sake of the few who are confused about where their loyalty lies.

/s/ David A. Irwin
Production Manager

Irwin testified that while he had no specific individual in mind when he wrote the notice, he knew the supporters of the Union were the same employees who supported the GBBA effort to organize the plant the prior year, because of the open manner in which they advocated the Union's cause in the plant. When questioned about his characterization of the union supporters in the notice, Irwin stated that based on his experience at other plants of the Respondent where unions represented the employees, "those stewards and officials were by and large people that did have problems and needed the protection of the Union to defend them against any disciplinary action that might come to them."

Based on the Irwin notice, the Union filed an unfair labor practice charge with the Board's Regional Office. The Acting Regional Director, through telephonic communication on March 18 and telegraphic communication on March 19, canceled the election and, after an investigation, the complaint herein issued.

Concluding Findings

The Respondent argues that the complaint should be dismissed for several reasons. First, the Respondent contends that it was prejudiced in its defense by being foreclosed from adducing testimony regarding Vazquez' activities on behalf of GBBA in 1980 and by not being allowed to introduce into evidence the certification of the results of the 1980 election. In this connection, the Respondent in effect moves to reopen the record to take testimony and evidence on this point.

In my judgment, the Respondent has not been prejudiced and the motion to reopen is denied. The issues here, as conceded by the Respondent at the hearing, are whether the language of the notice created an impression that the union activities of the employees were being kept under surveillance by management, and whether the language conveyed to the employees that it would be futile to select the Union as their bargaining representative. The fact that certain employees supported the GBBA attempt to represent the unit employees the year before does not warrant the assumption that these same employees were necessarily supporters of the Teamsters organizing effort. Therefore, any knowledge the Respondent may have had about employee support for GBBA is not material or relevant to the question of knowledge of the identities of the employees engaged in activities on behalf of the Teamsters Union. Nor is the result of the GBBA election probative evidence on this point. Moreover, the Respondent was permitted to get the 1980 election results into the record through testimony. In these circumstances, the claim of prejudice is without merit and the motion to reopen the record is unfounded.[7]

Next, the Respondent asserts that the Acting Regional Director should have conducted the election March 19 and impounded the ballots pending the results of the investigation of the unfair labor practice charge. The Respondent contends the failure to follow this course was an abuse of the Board's processes which can only be remedied by dismissing the complaint.

The action taken by the Acting Regional Director was well within his discretionary authority in handling representation matters, even though the Respondent may have disagreed with it. I do not deem it the function of an administrative law judge to "second guess" the exercise of this authority and I decline to do so. Accordingly, this contention of the Respondent is rejected.

This leaves the narrow issues presented by the Irwin notice posted on March 16. The notice was addressed to "You Who Would Sell Out Your Fellow Workers" and was posted as an "open letter" to the supporters of the Union; described in the notice as "that radical minority in our plant." Although the notice contained a "cc:" to "All Loyal O-I Employees," its only publication and distribution was by means of the posting on the bulletin board in the employees' breakroom on May 16. The General Counsel's contention that an impression of surveillance was created must, of necessity, rest on the language of the first two sentences of the second paragraph. There, the writer stated, "You know who you are. My fellow employees know who you are and I know who you are." To extract this narrow portion of that paragraph to support a finding of creating an impression of surveillance is to ignore the factual circumstances surrounding the genesis of the notice as well as the context of the balance of the statements contained in the notice.

It is unrefuted that the union supporters were quite open about their activities on behalf of the Union in the plant. It is also unrefuted in this record that the relationship between unit employees and management was such that all matters pertaining to the employment relationship were freely and openly discussed. In my judgment,

[7] The Respondent also contends it was prejudiced by the fact that it was not allowed to introduce into evidence the standard statement of employee rights, issued by the Acting Regional Director, and posted with the official notice of the pending election. The fact that the employees were advised of their rights in an official document from the Board is in no way probative of the question of whether the Irwin notice was in fact unlawful. Therefore, this proffered document was placed in the rejected exhibit file.

this environment compels the inference that the supporters of the Union were well known to employees and management alike. Thus, when the writer of the notice stated he knew who the union supporters were, he was merely stating that which was common knowledge in the plant. To now assert that his statement of this commonly known fact creates an impression that management was engaging in surveillance of employees' union activities is totally unrealistic. This is not a situation where employee union activity was being conducted in a clandestine or surreptitious manner. Rather, it was carried on openly and was clearly visible so that all in the plant became aware of who among the employees supported the Union. It would be an anomaly to hold that the language of the notice created an impression of surveillance when the writer was merely stating a fact well known throughout the plant by the employees and management. In the peculiar circumstances of this case, I find the language of the notice did not create an impression of surveillance nor did it have a tendency to do so.

The remainder of the paragraph where the asserted offending language is found goes on to state, "But more importantly I know *WHAT* you are. The law prohibits my indicting you directly, but if the shoe fits, wear it." The writer then goes on to describe certain undesirable employment characteristics which, in his opinion, typify union supporters. In so doing, he states, "This is probably the biggest reason you have for taking up the union flag, that being to gain the false security blanket they allegedly can give." The General Counsel contends that this language as well as the entire tenor of the notice conveyed to the employees that it was futile for them to select the Union as their bargaining representative.

Irwin testified that he based his characterization of union supporters on his experience at other plants of the Respondent where the employees were represented by unions. The issue here is not the correctness of his assessment of the characteristics of union supporters but whether his comments were merely expressions of opinion protected under Section 8(c) of the Act. There were no accompanying promises or threats contained in the notice, nor does the General Counsel so contend. In addition, nothing contained in the notice could be construed as indicating that the Respondent would either refuse to bargain with the Union or bargain in bad faith, if the Union were selected as the collective-bargaining representative of the employees. In these circumstances, I find that the comments contained in the notice were permissible under Section 8(c) as protected statements of opinion which did not contain any coercive promise or threat. I find, therefore, that the General Counsel has failed to establish by a preponderance of the credible evidence in the record that the Respondent has committed a violation of the Act. Cf. *Gorman Machine Corporation*, 257 NLRB 51 (1981); *Thomas Industries, Inc.*, 255 NLRB 646 (1981); *Elk Brand Manufacturing Company*, 253 NLRB 1038, fn. 6 (1981).

CONCLUSIONS OF LAW

1. Owens-Illinois, Inc., Plastic Products Division is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 490, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The credited testimony and record evidence does not establish that the Respondent has violated Section 8(a)(1) of the Act by posting a notice, authored by its production manager, in opposition to the unionization of its employees on March 16, 1981.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

It is hereby recommended that the complaint in this case be, and the same hereby is, dismissed in its entirety.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.